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No. 668

IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1954.

LOCAL 175 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and EARL W. BURNETTE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Local 175 of the International Brotherhood of Electrical Workers and Earl W. Burnette, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 24, 1955.

OPINIONS BELOW.

The judgment of the District Court is printed in Appendix B hereto at page 8. The Opinion and Judgment of the Circuit Court of Appeals is printed in Appendix B hereto at pages 8-12.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 24, 1955 (p. 8, infra). The judgment of this Court is invoked under 28 U. S. C., Section 1254 (1), and Rule 22 (2).

QUESTIONS PRESENTED.

(1) Whether the indictment charged violation of the Sherman Act, and (2) whether the Sherman Act is applicable to the activities of a labor union, or whether such labor union is exempt under Sec. 6 of the Clayton Act, Sec. 17, Title 15, U. S. C., and (3) whether the Government's evidence was sufficient to take the case to the jury.

STATUTES INVOLVED.

The statutory provisions involved are Sec. 6 of the Clayton Act, Sec. 17, Title 15, U. S. C. (Appendix A hereto at page 7), and Section 1 of the Sherman Act, Sections 1 and 2, Title 15, U. S. C. (Appendix A hereto at page 7).

STATEMENT.

Local 175 of the International Brotherhood of Electrical Workers, and Earl W. Burnette, its business agent, were charged in a one-count indictment (page 4a, Appendix to Brief of Appellants in the Court of Appeals) with combining and conspiring with the National Electrical Contractors Association, Chattanooga Chapter, which was a

corporation of electrical contractors operating within the Chattanooga, Tennessee, area, a number of individual electrical contractors who were members of the contractors' association, and other individuals to restrain interstate trade and commerce in electrical equipment through suppressing and eliminating competition in the sale and installation of such equipment in the Chattanooga, Tennessee, area, in violation of Section 1 of the Sherman Act (Sections 1 and 2, Title 15, U. S. C.).

Criminal action was brought by the Government against Local Union No. 175, a labor union whose membership is composed of electrical workers; Earl Burnette, who is Business Agent for Local 175; also against a trade association of electrical contractors, and a number of individual electrical contractors who were members of a contractors' association, and other individuals. All of the defendants under the original indictment, except petitioners herein, filed pleas of nolle contendere and their cases were disposed of before the trial of this cause in the District Court. Petitioners entered a plea of not guilty.

On the 9th day of July, 1953, petitioners filed motions to dismiss the indictment (page 14a, Appendix to Brief of Appellants in Court of Appeals). On August 6, 1953, motion to dismiss was denied (page 25a, Appendix to Brief of Appellants in Court of Appeals).

Trial of the case before a jury began on January 25, 1954, and at the close of the Government's evidence-in-chief motion was duly made for directed verdict of acquittal on January 28, 1954, which motion was denied and exceptions were taken. On February 5, 1954, the jury returned a verdict of guilty. Motion for new trial was filed on February 9, 1954, and on February 10, 1954, motion was argued and overruled and the Court entered judgment and imposed fines (pages 125a and 126a, Appendix to Brief of Appellants in Court of Appeals).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case and in United States v. Employing Plasterers Association, 347 U. S. 186, and U. S. v. Employing Lathers Association, 347 U. S. 198, upon the authority of which the issue in the instant case of whether the indictment charged a violation of the Sherman Act or only constituted merely a charge of local restraint and monopoly not reached by the Act, are directly in conflict with the following decisions:

U. S. v. San Francisco Electrical Contractors Assn. et al. (1944), 57 F. Supp. 57 (App. C, pp. 14, 15, infra);

U. S. v. Greater Kansas City Chapter National Electrical Assn. et al., 82 F. Supp. 147 (App. C, p. 13, infra);

Apex Hos. Co. v. Leader et al., 310 U. S. 469 (App. C, p. 14, infra);

Lumber Products Assn., Inc., v. U. S. (9th Cir., 1944), 144 S. 2d 545 (App. C, pp. 15, 16, infra);

Whitewell v. Continental Tobacco Co. (C. C. A. 8, 1903), 125 F. 454 (App. C, pp. 17, 18, infra);

Hopkins v. U. S., 171 U. S. 578 (App. C, p. 18, infra);

Mariemelli, Ltd., v. United Booking Officer, 227 F. 165 (App. C, p. 18, infra).

In a case where the indictment was almost identical to the one here before the Court, i. e., **U. S. v. Greater Kansas City Chapter National Electrical Assn.**, referring to the allegation of interstate commerce, the court held that the acts charged did not remotely affect interstate commerce, and cited Apex Hosiery Co. v. Leader et al. App. C, p. 14, infra.

In **U. S. v. San Francisco Electrical Contractors Assn.**, the Court ruled: "If the object of the agreement is to reg-

ulate labor conditions the plan does not violate the law. If the object of the agreement is to monopolize interstate commerce it is a violation of the law." App. C, pp. 14, 15, infra.

In **Lumber Products Assn., Inc., v. U. S. (9th Cir., 1944)**, the union was held responsible for a Sherman Act violation. There no labor dispute was involved but a mere combination to keep out non-area products was proved. The Court reasoned that "At the most we have an agreement or combination between employer and employees to adopt a method of bidding which will be fair to the industry and could only have a remote, indirect effect upon interstate commerce not within the Sherman Act." App. C, pp. 15, 16, infra.

In the case of **Albrecht v. Kinsella, 119 F. 2d 1003**, the court held that instances in which a labor union can run afoul of the Act are few, and added: "The deciding issue is that the effect upon interstate commerce is merely incidental and remote as the object of the conspiracy was not directed against such interstate trade but wholly against local trade." App. C, p. 17, infra.

The courts have held that the construction of the Anti-Trust Act will not be applied to an indirect restraint of interstate trade or commerce, but only to those instances of direct restraint. **Whitewell v. Continental Tobacco Co., 125 F. 454.** App. C, pp. 17, 18, infra.

The Supreme Court has held in the case of **Hopkins v. United States, 171 U. S. 578**, that: "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it." App. C, p. 18, infra.

In the case of **H. B. Mariemelli, Ltd., v. United Booking Officer, 227 F. 165,** Judge Learned Hand said: "* * * results insignificant in proportion to the total effect will be disregarded." App. C, p. 18, infra.

Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in many cases. The indictment in the instant case alleges a conspiracy directed entirely at the local market. As the above cases indicate, the effect upon interstate commerce necessary to cause an agreement to be illegal is a direct and substantial effect.

2. The decision of the court below in the instant case and in Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, and U. S. v. Employing Plasterers Assoc., 347 U. S. 198, upon the authority of which the issue in the instant case of whether the Sherman Act is applicable to the activities of petitioners under Section 6 of the Clayton Act, Sec. 17, Title 15, U. S. C. (App. A, p. 7, infra), is in conflict with the holding that the Sherman Act is inapplicable to the activities of unions by reason of exempting under Section 6 of the Clayton Act. Albrecht v. Kinsella, 119 F. 2d 1003 (App. C, p. 17, infra).

3. The government's evidence was insufficient to take the case to the jury (pages 29a to 124a, Appendix to Brief of Appellants in Court of Appeals).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

H. G. B. KING,

Counsel for Petitioners.

APPENDIX A.

Section 1 of the Sherman Act, 15 U. S. C., Sec. 1:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000.00, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Section 6 of Clayton Act, Sec. 17, Title 15, U. S. C.:

"Sec. 17. Antitrust laws not applicable to labor organizations. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

APPENDIX B.

OPINIONS AND JUDGMENTS BELOW.

In the District Court of the United States
For the Eastern District of Tennessee.

Judgment — February 10, 1954. "Local 175, fine of $3,000.00 and 3/4 of the costs; Earl W. Burnette, fine of $1,000.00 and 1/4 of the costs. Darr, D. J."

Proceedings in the United States Court of Appeals
For the Sixth Circuit.

(February 5, 1955—Before: Simons, Miller and Stewart, JJ.)

This cause is argued by H. G. B. King for appellants and by Fred D. Turnage for appellee and is submitted to the Court.

Judgment.

(Filed February 24, 1955.)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be and the same are hereby affirmed.

Opinion.

(Filed February 24, 1955.)

(Filed Feb. 24, 1955. Carl W. Reuss, Clerk.)

No. 12262.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Local 175 of the International Brotherhood of Electrical Workers and Earl W. Burnette, Appellants, v. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided February 24, 1955.

Before Simons, Chief Judge; Miller and Stewart, Circuit Judges.

Per Curiam. The appellants, Local 175 of the International Brotherhood of Electrical Workers, and Earl W. Burnette, its business agent, were charged in a one-count indictment with combining and conspiring with the National Electrical Contractors Association, Chattanooga Chapter, which was a corporation of electrical contractors operating within the Chattanooga, Tennessee area, a number of individual electrical contractors who were members of the contractors' association, and other individuals to restrain interstate trade and commerce in electrical equipment through supressing and eliminating competition in the sale and installation of such equipment in the Chattanooga, Tennessee area, in violation of Section 1 of the Sherman Act. Sections 1 and 2, Title 15, U. S. Code. All of the defendants, except the appellants, filed pleas of nolle

contendere. Appellants entered a plea of not guilty. Following a jury trial and a verdict of guilty, fines were imposed, from which judgments they have prosecuted this appeal.

Briefly summarizing the indictment, it alleged that over 75% of the electrical equipment sold and installed in the Chattanooga area was manufactured out of State and shipped into the Chattanooga area; that the appellant Union supplied the skilled labor which was used in the installation of more than 90% of the electrical equipment so sold and installed in the Chattanooga area; that over 75% of the electrical equipment sold and installed by electrical contractors in the Chattanooga area was sold and installed by members of the National Electrical Contractors' Association; that the value of the electrical equipment sold and installed in 1952 by electrical contractors in the Chattanooga area was over one million dollars; that a substantial quantity of electrical equipment ordered by Chattanooga electrical contractors was shipped directly from out of State manufacturers to the places of business of Chattanooga electrical contractors or to the site of its installation; that electrical contractors, including those named as defendants, were conduits through which electrical equipment produced in states other than Tennessee was sold and distributed to consumers in the Chattanooga area; and that the equipment "flows in a continuous uninterrupted stream from its points of origin in states other than Tennessee to its places of installation and use within the Chattanooga area."

The indictment further charged that the defendants entered into a continuing agreement of the following nature. Association electrical contractors who intended to submit a bid for the sale and installation of electrical equipment registered with the Association; those who so registered agreed upon and designated the low bidder on the job in

question; the other members either did not submit a bid or submitted complimentary bids at higher figures; that in case of disagreement as to which member should get a particular job, the matter would be referred for decision to the Grievances Committee, composed of officers and directors of the Association, who would finally designate the member who would be the low bidder; that any association member who refused to comply with the foregoing procedure was subject to a fine; that in order to enforce compliance with the foregoing procedure, the appellant union would refuse to supply union labor for, or withdraw union labor from, or would supply only incompetent labor on, any job desired by association members, unless such job was awarded to the designated or selected member; that appellant union refused to enter into labor contracts with non-association electrical contractors in the Chattanooga area unless they agreed not to compete with the association members on jobs desired by such members; and that the appellant union would picket any job in the Chattanooga area on which the electrical contracting work was being performed by labor not supplied by the appellant union, and would place upon its "unfair list" any awarding authority who awarded a contract for the sale and installation of electrical equipment to any electrical contractor using labor not supplied by the appellant union. The indictment further charged that during the period in question the defendants and co-conspirators "have done those things . . . they combined and conspired to do" and that the necessary effect was to unlawfully restrain and obstruct the flow of electrical equipment in interstate commerce into the Chattanooga area.

Appellants contend that the indictment did not charge violation of the Sherman Act, but constituted merely a charge of local restraint and monopoly not reached by the Act. This contention, under a similar factual situation, was recently considered and determined by the Supreme

Court adversely to appellants' contention. **United States v. Employing Plasterers Association,** 347 U. S. 186; **United States v. Employing Lathers Association,** 347 U. S. 198. See also **United States v. Women's Sportswear Manufacturers Ass'n,** 336 U. S. 460, 464; **Universal Milk Bottle Service v. United States,** 188 F. (2d) 959, C. A. 6th; **United States v. Northeast Texas Chapter,** 181 F. (2d) 30, 33-34, C. A. 5th; **Las Vegas Merchant Plumbers Ass'n v. United States,** 210 F. (2d) 732, C. A. 9th.

Appellants also contend that the Sherman Act is inapplicable to their activities because of the labor union exemption in Sec. 6 of the Clayton Act, Sec. 17, Title 15, U. S. Code. However, the Clayton Act does not exempt a labor union from the scope of the Sherman Act when the union and its officials aid and abet non-labor groups in violating the Act. **Allen Bradley Co. v. Local Union No. 3,** 325 U. S. 797; **United States v. Employing Plasterers Association,** supra.

We are also of the opinion that the Government's evidence was sufficient to take the case to the jury. Direct evidence of the agreement forming the basis of the conspiracy is not required. The conspiracy may be inferred from what was done in the light of the natural consequences flowing from such acts. **Eastern States Lumber Ass'n v. United States,** 234 U. S. 600, 612; **Henderson v. United States,** 202 F. (2d) 400, 403, C. A. 6th. The evidence respecting the contractors John Sliger, Joe Sliger, Curtis Electric Co., City Electric Co., Drinnon and Lewis, and Hagaman Electric Co., with the inferences favorable to the Government reasonably and justifiably to be drawn therefrom, strongly supported the Government's case. On this review we do not weigh the conflicting evidence relied upon by appellant or the credibility of the witnesses. **Battjes v. United States,** 172 F. (2d) 1, 5, C. A. 6th.

The judgments are affirmed.

APPENDIX C.

Conflicting Opinions.

In the case of **U. S. v. Greater Kansas City Chapter National Electrical Assn. et al., 82 F. Supp. 147,** the indictment charged the defendants, who were electrical contractors in the Springfield, Missouri, area, with a conspiracy and agreement and consort of action to restrain trade. The indictment alleged the type of business done, the amount of trade involved and that most of the electrical equipment used was purchased from manufacturers outside of the state. It alleged that the defendants had been engaged in a combination and conspiracy in restraint of trade among the several states, consisting of a continuing agreement and concert of action among the defendants that the defendant electrical contractors agree that they would not enter into contracts with owners and builders to supply only the labor required in the installation, alteration and repair of electrical systems unless said owners and builders would pay an additional sum representing agreement and concert of action among the defendants; would have realized if the electrical materials had been supplied by them. The Court said:

> "**Details must be given to show in what manner interstate trade was restrained by the alleged conspiracy.** This indictment does not disclose such effect. No inference could be drawn from the averments of the indictment that the defendants could profit or benefit by any restriction or restraint upon the free flow of electrical equipment into the area where they carried out their activity. On the contrary their interest is against an impairment or diminution in the free flow of commerce in electrical supplies into the area. The owner or builder had an option either to purchase the electrical equipment

necessary for the installation and then divide or pay all the profit over to the defendants or permit the defendants to purchase or supply the electrical equipment and material along with their labor * * * there was no restraint upon interstate trade * * * there can be no violation of law." (Emphasis supplied.)

The Court went on to say that assuming defendants indispensable to installation of electrical equipment in the area, and assuming also their refusal to contract with the owners and builders unless they complied with their request would impede the flow of interstate commerce, yet there would still be no violation of law under the express clear holding of the Supreme Court in the case of **Apex Hosiery Co. v. Leader et al., 310 U. S. 469.** The object of the common law of our statutory laws is to prevent trusts and combinations of business and of capital organized and directed to the controlling of the markets or suppression of competition in the marketing of goods. At page 150 the Court makes its central point:

> **"The acts charged did not remotely affect interstate commerce. Whether the defendants furnished the equipment, or the consumers furnished the equipment, the flow of commerce would be the same."** (Emphasis supplied.)

Particular note should be taken of the case of **U. S. v. San Francisco Electrical Contractors Assn., Inc., et al., 57 F. Supp. 57.** This involved a proceeding by the United States against defendants charging them with a combination in violation of Section 1 of the Sherman Act. The cause was dismissed after evidence was taken before going to a jury. The charge was, in substance, that certain Unions combined with their employees to fix prices, etc. It appears that a bid control scheme was developed by the contractors. The indictment very specifically charged a combination and conspiracy to (a) increase, regulate, fix,

dictate and control bids, (b) eliminate electrical contractors who refused to co-operate, (c) increase the cost of electrical equipment which had been shipped in interstate commerce and (4) restrict the volume and amount of electrical equipment shipped into the San Francisco Bay area.

It appeared that the contractors association and the Union had a collective bargaining agreement which gave preference to Union members over non-union workers. The business agent of the Union, apparently, urged contractors to join the association. Defendants were an electrical contractors association, electrical contractors, certain individuals in the electrical industry and two locals of the International Brotherhood of Electrical Workers, including their officers and the head of the International Union. It appeared that in the contract with the Union the contractor agreed that he would comply with the trade practices of the association. The Government contends that the International Union approved this form of contract through its president, hence he is a defendant. Evidence that one business agent threatened to "pull" the men of a contractor off his job and all others if he did not settle the dispute with the association arriving from the bid method was introduced. After a very good review of all the law regarding a Union's liability under the Sherman Act, the Court ruled:

> "If the object of the agreement is to regulate labor conditions the plan does not violate the law. If the object of the agreement is to monopolize interstate commerce it is a violation of law."

The Court quoted at length the **Lumber Products Assn., Inc., v. U. S. (9th Cir., 1944), 144 F. 2d 545,** case which held the Union responsible for a Sherman Act violation. There, no labor dispute was involved but a mere combination to keep out non-area products was proved. The Court, in the San Francisco case, said:

> "Here also we have no labor dispute but a provision not referred to by name in one of forty-two clauses which indirectly binds the union to an alleged illegal conspiracy, but here we do not even have an agreement not to work or actual refusal to work. No evidence of price effect on interstate commerce was proved although alleged. Incoming electrical equipment is controlled by three or four big companies in the area. The quantity of materials they shipped to their agencies within the area and the prices they sold it at were not shown to be affected by any agreement between the electrical contractors and the unions."

The Court held that even if it could be deduced by inference that the conspiracy had a substantial effect upon the volume of electrical equipment moving in interstate commerce, and that the prices which the interstate shippers charged for the equipment was different on account of the agreement, **still there would not be a violation of the Sherman Act for, at the best, these results would only be the inconsequential, remote and unsubstantial result of an agreement wholly local in nature.**

The Court's main point, which we believe is controlling, was simply made:

> "This agreement pertained not to interstate commerce but intrastate commerce."

The Court reasoned that they did not resell goods, but added something, i. e., skill, work, design, engineering, etc., and, therefore, that they sold their ability.

> "At the most we have an agreement or combination between employer and employees to adopt a method of bidding which will be fair to the industry and could only have a remote, indirect effect upon interstate commerce not within the Sherman Act."

The case of **Albrecht v. Kinsella, 119 F. 2d 1003,** was an action by plaintiff for damages arising out of an alleged conspiracy between a contractors' association and a Labor Union to monopolize, to the exclusion of plaintiff, the contracting business in the City of Peoria, Illinois. From an adverse judgment, the plaintiff appealed. The Trial Court sustained defendant's motion to dismiss. The Circuit Court said the issues were clear—Does the complaint allege conspiracy within the Sherman and Clayton Acts? Is a Union liable for a violation of said Acts? The complaint alleged a clear conspiracy in that defendant union refused to work for plaintiff unless he joined the contractors' association and the association would not permit him to join to his great loss. The Circuit Court said that since the Apex Hosiery Company v. Leader case, 310 U. S. 469, it is clear that instances in which a labor union can run afoul of the Act are few. The Court said:

> **"The deciding issue is that the effect upon interstate commerce is merely incidental and remote as the object of the conspiracy was not directed against such interstate trade but wholly against local trade."** (Emphasis supplied.)

Judge Sanborn, in speaking of the purposes of the Act, said in **Whitewell v. Continental Tobacco Co. (C. C. A. 8., 1903), 125 F. 454:**

> "The purpose was to prevent the stifling or substantial restriction of competition. The test of the legality of a combination under the Act which was inspired by the purpose is its **direct and necessary effect upon competition and commerce among the states.** If its necessary effect is to stifle and directly and substantially restrict free competition, it is a contract combination or conspiracy in restraint of trade, and it falls under the ban of the law, * * *
>
> "If, on the other hand, it promotes or **but inci-**

> **dentally or indirectly restricts competition** while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of this Act and is not subject to its denunciation. * * *" (Emphasis supplied.)

The Supreme Court of the United States has said in the case of **Hopkins v. United States, 171 U. S. 578:**

> "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it."

In the case of **H. B. Mariemelli, Ltd., v. United Booking Offices, 227 F. 165,** Judge Learned Hand said:

> "It may be that some effects of a combination, certain enough to follow, bear so small a proportion of the sum total that the Sherman Act will not reach the combination as a whole. Although the statute may seem to exercise the Federal power to its fullest capacity and **although Congress no doubt might make illegal any combination which to the parties' knowledge affected interstate commerce in any degree whatever,** the decisions of the Supreme Court certainly prove that it has not been so interpreted and that **results insignificant in proportion to the total effect will be disregarded.** This, in any case, is the present meaning of the test to direct and indirect, as I understand it, in the development of the decisions." (Emphasis supplied.)